U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

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Date: March 24, 1999

Case No.: **1998 INA 234**

In the Matter of:

FRANKENBACH'S DEERFIELD NURSERY, INC., Employer,

on behalf of

JOEL GOMEZ-FLORES, Alien

Certifying Officer: Delores DeHaan, Region II.
Appearance: Mario DeGraham, Esq., of Farmington, New York, for the Employer and Alien

Before : Huddleston, Jarvis, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from the labor certification application that FRANKENBACH'S "Employer"), filed on behalf of JOEL GOMEZ-FLORES ("Alien"), under § 212(a) (5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor at New York, New York, denied the application, and the Employer requested review pursuant to 20 CFR § 656.26.[1]

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United

[1] The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

States and at the place where the alien is to perform the work that (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

STATEMENT OF THE CASE

On June 29, 1995, the Employer filed for alien labor certification on behalf of the Alien to fill the position of "Landscape Gardener" for its Nursery business. The job duties were described as follows:

> Mow and thatch lawn. Edge and prune shrubs. Weed gardens and apply chemical treatments to grounds. Rake leaves and shovel snow. Repair and maintain related garden equipment such as mowers and blowers.

AF 17. No educational qualification was specified, but the Employer required two years of experience in the Job Offered or two years as an Assistant Landscape Gardener. *Id*., Items 13, 14.[2] The position offered was classified as a "Gardener" under DOT Occupational Code No. 406.684-014.[3] The wage offered was $12.18 per hour for a forty hour week. The hours were 8:00 A.M. to 5:00 P.M., with no overtime. Although nine U. S. workers were referred for this position by the state employment security agency, none of them was hired. AF 29-32.

Notice of Findings. The CO's January 27, 1998, Notice of Findings ("NOF") made the following findings: (1) the job duties described in the Application are normally performed on a seasonal basis during the warmer months (spring, summer, and early fall) and not during the

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[3] The Alien, a national of Mexico, was born 1976. His education was not disclosed. He was living in South Southhampton, New York, under an EWI visa at the time of application. The Alien worked as a gardener from 1990 to 1993 in Mexico, where he handled agricultural machinery, and he grew and maintained vegetables and trees. From 1993 to the date of application the Alien worked for the Employer, performing duties similar to those described in the Form ETA 750 A. He was unemployed from March 1992 to early 1993.

[3] 406.684-014 **GROUNDSKEEPER, INDUSTRIAL-COMMERCIAL (any industry) alternate titles: caretaker, grounds; gardener.** Maintains grounds of industrial, commercial, or public property, performing any combination of following tasks: Cuts lawns, using hand mower or power mower. Trims and edges around walks, flower beds, and walls, using clippers, weed cutters, and edging tools. Prunes shrubs and trees to shape and improve growth or remove damaged leaves, branches, or twigs, using shears, pruners, or chain saw. Sprays lawn, shrubs, and trees with fertilizer, herbicides, and insecticides, using hand or automatic sprayer. Rakes and bags or burns leaves, using rake. Cleans grounds and removes litter, using spiked stick or broom. Shovels snow from walks and driveways. Spreads salt on public passage ways to prevent ice buildup. Plants grass, flowers, trees, and shrubs, using gardening tools. Waters lawn and shrubs, using hose or by activating fixed or portable sprinkler system. May repair fences, gates, walls, and walks, using carpentry and masonry tools. May paint fences and outbuildings. May clean out drainage ditches and culverts, using shovel and rake. May perform ground maintenance duties, using tractor equipped with attachments, such as mowers, lime or fertilizer spreaders, lawn roller, and snow removal equipment. May sharpen tools, such as weed cutters, edging tools, and shears, using file or knife sharpener. May make minor repairs on equipment, such as lawn mower, spreader, and snow removal equipment, using handtools and power tools. May perform variety of laboring duties, common to type of employing establishment. *GOE: 03.04.04 STRENGTH: M GED: R2 M1 L2 SVP: 3 DLU: 86*

winter. In addition, the workers performing such work in this industry are generally laid off without pay during the coal weather months. Citing 20 CFR § 656.3, the NOF said, "In view of this, the Employer's ability to guarantee permanent full-time (year 'round) work for the position is questionable." AF 36. (2) Based on 20 CFR § 656.21(b)(2), the NOF noted that the DOT Specific Vocational Preparation (SVP) for a Gardener is 3, which calls for an SVP of one to three months, while Employer's Application required two years' experience in the Job Offered or two years' experience as a Landscape Gardener Assistant, a period that materially exceeded the hiring criteria of the DOT.[4] Based on the DOT provision that the SVP includes vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs, the NOF explained that, "Employer's letter dated July 30, 1996, does not adequately establish why the job duties presently could not be satisfactorily performed by someone with three months' experience." (3) Citing 20 CFR § 656.21(b)(5), the NOF noted that Employer required two years' experience in the Job Offered or as an Assistant Landscape Gardener as its hiring criterion for the adequate performance of the job. The NOF said Alien had no experience as a Gardener or as a Assistant Landscape Gardener before the Employer hired him because his work as a gardener in Mexico consisted of operating agricultural machinery and growing vegetables and trees. While these duties did not appear consistent with the job description in Employer's application, the NOF said the work that the Alien performed for the Employer as an Assistant Landscape Gardener appeared to be the same as the Job Duties described in the Application for the Job Offered. The NOF concluded that the Employer had trained the Alien for the position at issue. The NOF then described in detail the evidence Employer was required to proffer in rebuttal to sustain the burden of proof as to all of the defects noted. AF 34-36.

Rebuttal. On February 20, 1998, the Employer filed a Rebuttal in which it offered evidence and argument in response to the NOF. AF 39-89. (1) Employer offered evidence that it had maintained full-time employees during the months of November through February during the preceding three years and pointed to the Application job duties that had included the work

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[4] In Appendix C the DOT defined the Specific Vocational Preparation as the amount of elapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation. Appendix C further provided that this training may be acquired in a school, work, military, institutional, or vocational environment, but it does not include the orientation time required of a fully qualified worker to become accustomed to the special conditions of any new job. The vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs. The following are the various levels of specific vocational preparation fixed by Appendix C:

Level	Preparation
1	Short demonstration only.
2	Anything beyond short demonstration up to an including 1 month.
3	Over 1 month up to and including 3 months.
4	Over 3 months up to and including 6 months.
5	Over 6 months up to and including 1 year.
6	Over 1 year up to and including 2 years.
7	Over 2 years up to and including 4 years.
8	Over 4 years up to and including 10 years.
9	Over 10 years.

performed during the cold months of the year. (2) Employer said, "The job title of a Landscape Gardener is given a SVP of a 7," and contended that more than three months' experience was required to perform the duties it specified in its Application. (3) Employer said the Alien "was trained in his country" and that he had "also gained experience as an assistant landscape gardener" while working in its employ. The Employer concluded that, "The alien was trained by a Landscape Gardener[. T]hat is where he received his experience as an assistant," referring to the letter from the Alien's employer in Mexico, who said he was "a person very well known to the undersigned, honest, responsible in handling agricultural machinery and fluent in the knowledge of maintaining the conservation of vegetables, trees of adornment and fruit trees ... ." AF 86.

Final Determination. The CO denied certification in the Final Determination issued on March 12, 1998, based on the following reasons. AF 90-92. After considering Employer's rebuttal documentation with the remainder of the record, the CO found (1) that the Employer had established that the position constituted permanent full time work under the Act and regulations under 20 CFR § 656.3. The CO found, however, that the Employer failed to sustain his burden of proof that his application for alien labor certification complied with 20 CFR §§ 656.21(b)(2) and (5), however. Under 20 CFR § 656.21(b)(2), the CO said, the Employer failed to establish that its hiring criteria for the position were those normally required for performance of the job in the United States and as defined for the occupation in the DOT. After reviewing the NOF findings and instructions with the rebuttal, the CO said the duties described in item 13 of Form ETA 750 A are not representative of those performed by a Landscape Gardener in the DOT.[5] The CO said, "Employer's job description is most closely associated with that described for a Gardener, which is one of the sub-titles under the DOT position description of Groundskeeper, Industrial-Commercial. Therefore, the SVP for the Landscape Gardener position description is inapplicable." The CO concluded that the experience requirement was unduly restrictive and was not adequately documented as arising from business necesssity. AF 91.

Turning to 20 CFR § 656.21(b)(5), the CO said that the Alien had demonstrated no experience in the Job Offered or in the related occupation before Employer hired him, and that his experience in Mexico did not appear to be consistent with that required for this job. Noting the NOF finding that the Employer apparently had trained the Alien for the position offered and

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[5] 408.161-010 **LANDSCAPE GARDENER** (agriculture) alternate titles: landscaper. Plans and executes small scale landscaping operations and maintains grounds and landscape of private and business residences: Participates with LABORER LANDSCAPE (agriculture) in preparing and grading terrain, applying fertilizers, seeding and sodding lawns, and transplanting shrubs and plants, using manual and power-operated equipment. Plans lawns, and plants and cultivates them, using gardening implements and power-operated equipment. Plants new and repairs established lawns, using seed mixtures and fertilizers recommended for particular soil type and lawn location. Locates and plants shrubs, trees, and flowers selected by property owner or those recommended for particular landscape effect. Mows and trims lawns, using hand mower or power mower. Trims shrubs and cultivates gardens. Cleans grounds, using rakes, brooms, and hose. Sprays trees and shrubs, and applies supplemental liquid and dry nutrients to lawn and trees. May dig trenches and install drain tiles. May make repairs to concrete and asphalt walks and driveways. *GOE: 03.01.03 STRENGTH: H GED: R4 M4 L4 SVP: 7 DLU: 77.*

the NOF direction to file rebuttal evidence that would overcome this defect, the CO rejected Employer's assertion that the duties Alien currently was performing as an Assistant Landscape Gardener were different, and that as a Landscape Gardener he would be in charge of the performance of the duties described in the Application. The CO said that even though Employer gave Claimant's current job the title of "Landscape Gardener," his duties actually were those of a Gardener and not of a Landscape Gardener. Observing that the duties the Alien presently was performing as an Assistant Landscape Gardener with the Employer were not substantially different from those stated in Form ETA 750 A at box 13, the CO concluded that the Employer had trained the Alien in the duties described in the Job Offer, and that it had not documented adequately the infeasibility of training some one else for the position at issue.[6] AF 90.

Appeal. The Employer appealed to BALCA on April 14, 1998. Employer's argument that the Alien acquired the requisite experience while working in Mexico on the job described in Form ETA 7540 B was based on the letter by the former employer, who referred to the Alien's "knowledge of maintaining the conservation of vegetables, trees of adornment and fruit trees." Additional evidence that was not part of the Appellate File was attached to the Employer's appeal and will not be considered by the Panel.[7]

Discussion

20 CFR § 656.21(b)(2). The Panel does not agree with the CO's findings under 20 CFR § 656.21(b)(2), as the DOT job classification is wrong. The position described in Form ETA 750 A clearly referred to a Landscape Gardener under DOT Occupation No. 408.161-010. It did not refer to a Groundskeeper, Industrial-Commercial under DOT Occupation No. 406.684-014 because the work of an Industrial-Commercial Groundskeeper involves the maintenance of the grounds of industrial, commercial, or public properties while performing the tasks described in the DOT occupation description. There is nothing in the record that supports a finding that the Job Offered involves work on industrial, commercial, or public properties.

After examining the Application, the NOF, the rebuttal, the Final Determination, and the texts of DOT Occupation descriptions for a Landscape Gardener under DOT Occupation No. 408.161-010 and a Groundskeeper, Industrial-Commercial under DOT Occupation No. 406.684-014, the Panel concludes that the SVP for a Landscape Gardener was an appropriate qualification for this position. Consequently, the Panel concludes that the SVP requirement in

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[6] The CO also noted that Employer's rebuttal failed to amend Item 7 in the Form ETA 750 A to disclose the location where the Alien would work, as it only gave a post office box as its address. The Employer's appeal attached a copy of an appropriate amendment, which was dated April 10, 1998. AF 122. As this was not filed until nearly two months after the rebuttal was filed and about a month after the Final Determination, the defect clearly was not timely remedied, even though it was duly cited in the NOF. As the primary objections to certification were a sufficient basis to deny certification, the Panel will not address this defect.

[7] As Employer did not file the job description taken from the Immigration Research Information Service until it requested review, the CO did not have the opportunity to consider this evidence, and it cannot be considered by the Panel as a part of the Appellate File. **Capriccio's Restaurant**, 90 INA 480 (Jan. 7, 1992); **Kogan & Moore Architects, Inc.**, 90 INA 466 (May 10, 1991).

the Employer's Application was not unduly restrictive under 20 CFR § 656.21(b)(2).

20 CFR § 656.21(b)(5). The CO's denial of alien labor certification is affirmed, however, because Employer's rebuttal failed to sustain its burden of proof in addressing 20 CFR § 656.21(b)(5). While it may adopt any qualifications it may fancy for the workers it hires in its business, an employer must comply with the Act and regulations when it seeks to apply such hiring criteria to U. S. job seekers in the course of testing the labor market in support of an application for alien labor certification. This is particularly the case where, as in this application, the employer's hiring criteria conflict with the provisions of 20 CFR 656.21(b)(5), a regulation adopted to implement the relief granted by the Act, which provides that, "The employer shall document that its requirements for the job opportunity, as described, represent the employer's actual minimum requirements for the job opportunity, and the employer has not hired workers with less training or experience for jobs similar to that involved in the job opportunity or that it is not feasible to hire workers with less training or experience than that required by the employer's job offer. Thus, 20 CFR § 656.21(b)(5) prevents an employer from treating the alien's qualifications more favorably than it would treat the qualifications of a U. S. worker. **ERF, Inc. d/b/a Bayside Motor Inn,** 89 INA 105 (Feb. 14, 1990); also see **International School of Dog Grooming**, 93 INA 300 (Oct. 4, 1995). In addition, 20 CFR § 656.21 (b)(6) has buttressed this regulation by requiring the employer to establish either that the stated job requirements are its actual minimum requirement and that it has not hired workers with less training or experience for jobs similar to the position offered or that it is not feasible to hire workers with less training or experience than its job offer requires. While the NOF provided sufficient notice of the reasons for the denial of certification under 20 CFR § 656.21(b)(5), and told the Employer how to cure the defects found in the application, its rebuttal failed to sustain the burden of proof as to this issue.

The Employer appealed from the finding of the CO that the Alien's work in the job he held before he was hired by the Employer did not demonstrate experience in the Job Offered---Landscape Gardener---or in the Related Occupation---Assistant Landscape Gardener. To determine this issue the Panel compared the duties described in the Application with the work performed on the job in Mexico. The position Employer seeks to fill requires a worker to mow and thatch lawns, edge and prune shrubs, weed gardens, and apply chemical treatments to grounds. The employee also would rake leaves, shovel snow, and repair and maintain such related garden equipment as lawn mowers and snow blowers. In stating his qualifications the Alien represented only that he handled agricultural machinery and engaged in growing and maintaining vegetables and trees. From this it is reasonable to infer that the Alien had no experience in lawn maintenance at the time Employer hired him, although he apparently did have experience in weeding vegetables and maintaining trees. Beyond the operation of agricultural machinery, the Alien's experience did not include the application of chemical treatments and the repair and maintenance of such equipment as lawn mowers and snow blowers, and none can be inferred either from his own statement or from the statement of his former employer concerning the duties of his job in Mexico. Moreover, as the record does not contain any other evidence of the Alien's work before the Employer hired and trained him for this job, its representations in AF 18 cannot modify its actual minimum requirements for this job opportunity within the meaning of 20 CFR § 656.21(b)(5). For this reason the Panel concludes

that the correct measure of the Employer's minimum requirements in recruiting U. S. workers for this job was the Alien's work experience, as established by the evidence in the Appellate File. **Celia and Jose Lua**, 93 INA 304 (Jan. 26, 1995); **Valley Beth-Shalom School**, 91 INA 382 (Dec. 28, 1992).

Finding that the Alien had no experience as a Gardener or as an Assistant Landscape Gardener before he was hired by the Employer, the CO concluded that the Employer had trained the Alien for this position and so required it to prove that at the time he was hired the Alien had the qualifications it now was requiring of the U. S. applicants for the position. In the alternative the Employer was directed to amend its job requirements to meet the Alien's qualifications at the time it hired him or that it was not feasible to give a U. S., worker the same training as it had given the Alien for this job. AF 35. Although the Employer's rebuttal admitted the inferences that the CO had drawn in the NOF, the Employer neither amended its hiring criteria, nor proved that it had previously hired workers with less than the training and experience stated in its Application for work similar to that involved in the job opportunity, nor established that it was not feasible to hire workers with less training or experience than that required by this job offer and to provide the same training to a U. S. worker. AF 88; **Inmos Corp.**, 88 INA 326 (Jun. 1, 1990)(*en banc*); **Capriccio's Restaurant**, 90 INA 480 (Jan. 7, 1992).

Summary. The Panel concludes that the NOF provided adequate notice of the Application's deficiency and the corrective action required, but the Employer failed to provide the documentation requested in the NOF. **Gencorp.**, 87 INA 659 (Jan. 13, 1988)(*en banc*); and see **Rogue and Robelo Restaurant and Bar**, 88 INA 148 (Mar. 1, 1989)(*en banc*).
Since the evidence of record supports the CO's denial of labor certification under the Act and regulations, the following order will enter.

ORDER

The decision of the Certifying Officer denying certification under the Act and regulations is affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

Thank you,

Judge Neusner

Date: December 16, 1998